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Case No. 84-864

IN THE

Supreme Court of the United States

October Term, 1984

MILLER BREWING COMPANY,

Petitioner,

v.

BREWERY WORKERS LOCAL UNION NO. 9, DIRECTLY AFFILIATED LOCAL UNION, AFL-CIO,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*Petitioner submitted a Rule 28.1 listing its original petition. There are no amendments.

Case No. 84-864

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MILLER BREWING COMPANY,

Petitioner,

vs.

BREWERY WORKERS LOCAL UNION
NO. 9, DIRECTLY AFFILIATED
LOCAL UNION, AFL-CIO,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

It has come to Petitioner's attention within the last twenty-four hours that an extremely important unreported decision by an Administrative Law Judge of the National Labor Relations Board has issued

since the date Petitioner filed its petition with this Court. The case is entitled Brewery Workers Joint Local Executive Board, International Brotherhood of Teamsters, et al. and Anheuser-Busch, Inc., Case No. 22-CB-4995 (November 20, 1984), and a copy of the decision is attached hereto.

Petitioner believes it is essential to the Court's consideration of this Petition that it review and consider the attached decision. It is our understanding with regard to the status of the case that the Respondents have filed exceptions with the National Labor Relations Board and Anheuser-Busch has filed cross-exceptions as to the remedy provisions only.

In Anheuser-Busch the Administrative

Law Judge considered a Collective Bargaining Agreement employment preference clause for "regular" employees of certain other breweries in the Newark, New Jersey area represented by Respondents and found that said clause was illegal under the National Labor Relations Act. The clause at issue in the Anheuser-Busch case grants the same illegal preference as that granted in the clause at issue in the instant case. The Administrative Law Judge concluded that Respondents' attempts to force compliance with the illegal clause constituted unfair labor practices in violation of Section 8(b)(1)A) and (2) of the National Labor Relations Act. Respondents were accordingly ordered to cease and desist from attempting to enforce the illegal clause against Anheuser-Busch.

The reasoning of the Administrative Law Judge in Anheuser-Busch in concluding that the clause at issue is illegal is identical to the reasoning and arguments Petitioner has made to the District Court, the Court of Appeals for the Seventh Circuit and to this Honorable Court in the instant case. The cases Petitioner has cited in support of its position are identical to the cases cited by the Administrative Law Judge in reaching his decision. Accordingly, Petitioner urges the Court to carefully consider the attached Anheuser-Busch decision and, Petitioner submits, upon a careful consideration of the same, the only reasoned conclusion that can be reached is that reached by the Administrative Law Judge, which is stated as follows:

> Applying these standards to the instant case I conclude that the provisions in issue are on their face clearly repugnant to the purpose and policy of the Act. They are as a matter of law unlawful within the meaning of the Act. (Decision, page 11, emphasis added).

CONCLUSION

The Anheuser-Busch decision is a further clear statement that the Seventh Circuit's decision herein, if allowed to stand uncorrected, would seriously undermine Federal Labor Policy and conflict with decisions of the National Labor Relations Board, as well as prior decisions of this Court. Accordingly, Petitioner Miller Brewing Company respectfully requests that the Petition for Writ of Certiorari

be granted.

Respectfully submitted this 9th day of January, 1985.

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APPENDIX

JD-(NY)-142-84

Newark, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
NEW YORK, NEW YORK

BREWERY WORKERS JOINT LOCAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOCAL 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND LOCAL 843, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

Case No.22-CB-4995

ANHEUSER-BUSCH, INC.

Susan K. Anderson, Esq. for the General Counsel.
Edward F. Ryan, Esq. and Irving L. Hurwitz, Esq. (Carpenter, Bennett & Morrissey, Esqs.) for the Charging Party.
Emil Oxfeld, Esq. (Rothbard, Harris & Oxfeld, Esqs.) for Respondent Local 843.
Paul A. Montalbano, Esq. (Schneider, Cohen & Solomon, Esqs.) for Respondent Local 153.

DECISION

Statement of the Case

HOWARD EDELMAN, Administrative Law Judge: This case was tried before me on May 30, 1984 in Newark, New Jersey.

On December 12, 1983 Anheuser-Busch, Inc., herein called the Employer, filed a charge against the Brewery Workers Joint Local Executive Board, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Respondent Joint Board and its Locals 153 and 843, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called Respondent Local 153 and 843 respectively, alleging that the above named Respondents engaged in

violations of Section 8(b)(1)(A) and (2) of the Act.

On January 26, 1984 a complaint issued alleging that the above named Respondents, herein collectively called Respondent, required the Employer, pursuant to provisions in the collective bargaining agreement between the parties to give preference in hiring to out-of-work "regular" employees who are signatories to collective bargaining agreements with Respondent and to layoff, if necessary, "casual" employees hired by the Employer in violation of Section 8(b)(1)(A) and (2) of the Act.

Briefs were filed by Counsel for the General Counsel, counsel for the Employer, counsel for Local 843 and counsel for Local

153.[1] Upon my consideration of the entire record, the briefs, and my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

The Employer is a corporation with facilities located throughout the United States, including a facility located in Newark, New Jersey. The Employer is engaged in the brewing, sale and distribution of malt beverages. The Employer annually, in the course and conduct of its normal business operations purchases and receives goods, products and materials at its Newark,

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1 All counsels are to be complimented on the quality of their briefs. They were uniformly well written and well researched. They were most helpful to me in writing this decision.

New Jersey facility directly from points outside the State of New Jersey. It is admitted and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is admitted and I find that Respondent Joint Board, Respondent 153 and Respondent 843 are labor organizations within the meaning of Section 2(5) of the Act.[2]

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[2] Respondent Joint Board, which is comprised of Respondent Locals 153 and 843 and Local 102, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America was served with a copy of the charge and complaint. It filed no answer and did not make an appearance at the trial of this case. Under these circumstances I conclude that Respondent Joint Board is liable for the violations described below jointly and severally with Respondent Locals 153 and 843. Pinter Bros., Inc., 263 NLRB 723, 724, fn. 1 (1982).

In 1951 the Employer first opened its Newark, New Jersey facility. In 1953, Respondent Joint Board was certified as the collective bargaining representative in a unit of the Employer's production workers, warehousemen, bottlers, drivers, stock-handlers and porters. Since 1953 Respondent has represented the Employer's employees in this unit.

For several years prior to 1953, the New Jersey Brewers Association, herein called the "N.J. Brewers Association", an employer association of breweries in the New Jersey area, represented its member-employers in collective bargaining. It bargained and executed contracts on a multi-employer basis with Respondent Joint

Board which represented the employees of its members.

Following certification of Respondent Joint Board, the Employer joined the N.J. Brewers Association and authorized it to represent it in collective bargaining with Respondent Joint Board. Thereafter, until 1970, all bargaining concerning the Employer's employees in the above unit was through the N.J. Brewers Association on a multi-employer basis.

One of the provisions of the foregoing agreements, including the 1967-1970 Agreement, established preferential employment rights throughout the above multi-employer unit by providing, in substance, that a "regular" employee, upon loss of employment for any cause other than stealing, at one

brewery had the right to be hired by another prior to "temporary" or "casual" employees or in place of any "temporary" or "casual" employees already employed.

To attain regular status at the brewery at which the employee was employed and thereby have preferential employment rights at another brewery upon loss of employment, the employee must have worked for the same brewery for 225 days in any period of 52 consecutive weeks. An employee working less than this required period of time was classified as a "temporary" or "casual" employee.

By 1970 the Employer had expanded and became a nationwide operation, with facilities in Los Angeles, California; Tampa, Florida; Houston, Texas; Columbus, Ohio;

Jacksonville, Florida and Merrimack, New Hampshire. As a result of the Employer expansion to this nationwide operation, the International Brotherhood of Teamsters, through its National Conference of Brewery and Softdrink Workers, requested that the Employer engage in national or multi-plant bargaining for all its breweries in place of the previous separate bargaining at each facility. The Employer after initial resistance eventually agreed to such multi-plant bargaining and entered into an agreement with the Teamsters which provided that the parties would establish nationwide, multi-plant bargaining.

On January 15, 1970, Employer Executive Vice-President, R. A. Meyer sent a letter to Raymond Schoessling, National

Conference Secretary-Treasurer, which set forth that although the Employer had agreed to bargain on a national basis for all its breweries, it preferred to continue bargaining on a single plant basis in Newark where the Employer bargained through associations on a multi-employer basis.

On January 2, 1970, various Teamster locals, including Respondent Joint Board, passed a resolution which reaffirmed the desire for national negotiations and "urged (the Employer) to take all necessary steps including withdrawal from the Association in Newark... in order to effectuate such negotiations."

Shortly thereafter, the Employer agreed to the Teamsters' request to cease single plant, multi-employer bargaining in

Newark. The Employer wrote the N.J. Brewers Association and Respondent Joint Board notifying them that they were withdrawing bargaining authority from the Association and would no longer be represented by it in any negotiations with Respondent Joint Board. Within a short time thereafter, the N.J. Brewers Association itself ceased to exist for labor relations matters.

Sometime thereafter, the Essex Brewers' Labor Relations Association, herein the "Essex Brewers' Association" was formed. The Employer became a member of the Essex Brewers' Association. However, the Employer never authorized the Essex Brewers' Association to bargain for it. The facts establish that since 1970, no employer association has represented the Employer in collec-

tive bargaining with Respondent Joint Board and the Employer has not bargained jointly with any other employer concerning its employees represented by Respondent Joint Board. Since 1970, all Employer-Respondent Joint Board contracts have been solely between the Employer and Respondent and have been applicable only to the Employer's employees.

The Executive Secretary of the Essex Brewers' Association was Thomas Hayes. As such, he conducted the fourth step of the Employer-Respondent grievance procedure and maintained lists of "regular" employees. The Employer and Respondent, at times, used the Essex Brewers' Association offices for negotiations and Mr. Hayes kept minutes.

Mr. Hayes retired in 1981 and thereafter became a consultant. As such, he is employed by the Employer to conduct fourth step grievance hearings and to act as a conduit for the exchange of information between the Employer and Pabst Brewing Company, the only other brewery presently remaining in the Newark area. Pabst also bargains with Respondent on a single employer basis.

The above-noted national bargaining between the Employer and Teamsters in 1970 resulted in an Agreement effective from 1970 to 1973. This Agreement continued the Employer's pre-1970 pension contributions to the New Jersey Brewery Employees Pension Trust Fund. During 1973 negotiations, the Employer and Respondent agreed that the

Employer would establish its own pension plan and the 1973-1976 Agreement so provided. Accordingly, on July 23, 1973, the Employer withdrew from the New Jersey Brewery Employees Trust Fund.

The 1970-1973 Agreement and the 1973-1976 Agreement continued the pre-1970 provision for welfare benefits for the Employer's employees by employer contributions to the New Jersey Brewery Employees Welfare Trust Fund. In negotiations for the 1976-1979 Agreement, the Employer and Respondent agree to replace the New Jersey Brewery Employees Welfare Trust Fund with the Employer's own welfare plan and the 1976-1979 collective bargaining agreement so provided. Accordingly, on January 28, 1976, the Employer withdrew from the New

Jersey Brewery Employees Welfare Trust Fund.

Thus at the expiration of the 1976 agreement, the only common thread running between the Employer, the other New Jersey breweries (Pabst and Rheingold) and Respondent was that Hayes was a common arbitrator at 4th step grievances and the common seniority lists and preferential hiring provisions in issue and discussed below.

Between 1970 and continuing through the current collective bargaining agreement, all Employer-Respondent agreements contained the following provisions:[3]

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[3] Articles 0.3, 4.3-1, 4.3-3 and 4.10 of the current collective bargaining agreement between the Employer and Respondent.

Unless otherwise provided herein to the contrary, 'other Companies' as used in this Agreement shall mean Pabst Brewing Company and any other Company who becomes a member of the Essex Brewers' Labor Relations Association and a party to their collective bargaining agreement with the Union.

* * *

When a regular employee who is laid off by another Company is hired by Anheuser-Busch, he shall have no seniority rights except the right to work before casuals at Anheuser-Busch.

* * *

A regular employee, upon loss of employment, shall have the right to replace any porter, stockhandler, or laboratory technician who may be working as a casual employee, except those on the Company seniority roster.

* * *

The foregoing provisions made applicable to employees of other Companies with respect to employment rights at AnheuserBusch of regular employees, senior checkers, porters and stockhandlers shall be effective provided that the collective bargaining agreement between the Union and the Essex Brewers'

> Labor Relations Association and the other Companies contains the same standards as set forth in this Agreement for attaining regular employee status and senior porter, checker & stockhandler status and provides the same employment rights for regular employees, senior porters and stockhandlers of Anheuser-Busch, Inc.

As of 1976 Respondent's agreements with Pabst and Rheingold contained similar provisions.

In 1977, Rheingold closed its brewery. Respondent claimed that laid off Rheingold employees who had attained "regular" status under the Rheingold-Respondent agreement were entitled to preference over "casuals"

employed by the Employer in that they had a right to work prior to "casuals" and in lieu of "casuals". It was Respondent's position that if the Employer needed additional employees, those employees had to be Rheingold "regulars" rather than the Employer's "casuals". Thus, if the Employer had "casuals" working, the Rheingold "regulars" had the right to replace them. Pursuant to Respondent's demand, the Employer did hire Rheingold "regulars", thereby displacing its "casual" employees. The Employer took exception to Respondent's demand and the parties agreed to arbitrate the issue. During that arbitration, it was Respondent's position that:

> ...(I)ndustry-wide regulars have the contractual right to prefer-

> ence in employment over casual employees... the right of regular employees to such jobs as against so-called casuals and temporaries has been absolute, rigorous and continuous.

Arbitrator John J. Pearch issued his award on January 19, 1978, as follows:

> Under the terms of the collective bargaining agreement, the Company, on application, must give employment to industry regulars or industry-wide unattached regulars when the Company has in its employ, or in the selection for employment, casual employees.

In November, 1981, Pabst shut down its operation for one week, laid off most of

its work force and scheduled all employees to return to work the following week. During the week of the Pabst shutdown, the Employer abided by Respondent's demand that it employ, in place of its "casuals", the Pabst employees who had achieved "regular" status under the Pabst-Respondent agreement. At the end of that week, the Employer laid off the Pabst "regulars", who with the exception of 13 Pabst regulars returned to work at Pabst. As to these 13 Pabst regulars, they decided to waive their recall rights to Pabst and remain with the Employer. Respondent, by Frank Jackiewicz, its secretary, notified the Employer of this position. The Employer refused. Respondent grieved, and the matter was arbitrated. In that arbitration, it was

Respondent's position that the 13 Pabst "regulars" had a right to work at the Employer before any "casual" employees. On June 13, 1983, an arbitrator issued his award holding that the Employer should have employed the Pabst regulars prior to employing its casual employees.

On September 11, 1981, two Pabst regulars voluntarily submitted letters of resignation to Pabst. They sought employment with the Employer which would have resulted in the replacement of two casual employees. The Employer refused. The issue was arbitrated. In the arbitration hearing, Respondent stated that "it is the longstanding arrangement that regular employees are preferred in employment over casuals". On August 3, 1983, the arbi-

trator issued his Award that the resigned Pabst regulars had priority over casuals and ordered the Employer to employ them. Subsequently, Respondent, by Mr. Jackiewicz, demanded that the Employer comply with this Award. The Employer did so, causing the displacement of two of its casual employees.

In March 1984, a meeting was held between the Employer and Respondent during which Mr. Jackiewicz demanded that several additional laid off Pabst regulars be employed by the Employer and that the Employer displace casuals who were then working.

Paul Charrier, manager of employee relations testified that the replacement of casuals by regulars of other employers is a particularly troublesome issue at present

because of the Employer's present policy of recruiting and training new employees who will be casuals until they can complete their 225 days, in anticipation of replacing a large number of their regular complement of employees who will soon be retiring. Thus, the Employer wants to be able to hire and train a new work force and not have such program derailed by having to replace these trainees with other regular employees laid off from other breweries.

Analysis and Conclusions

The Board has consistently held that preferences to employees based upon the seniority of union membership accumulated through employment with a signatory employer violates Section 8(b)(1)(A) and (2) of the Act. In New York Typographical

Union No. 6, 242 NLRB 378 (1979), enforcement denied in rel. part, 632 F.2d 171 (2d Cir. 1980), the Board held that, in the absence of a multi-employer bargaining unit, a preference based upon an employee's employment in shop under contract with the union was directly related to union membership and discriminates against non-members in violation of Section 8(b)(1)(A) and (2). See also, Nassau-Suffolk Chapter of the National Electrical Contractors-Association, Inc., 215 NLRB 894 (1974), vacated and remanded on other grounds, 556 F.2d 76 (D.C. Cir. 1977), supp. opinion, 231 NLRB 1021 (1977), enf. in part, 586 F.2d 959 (2d Cir. 1978).

In International Photographers of the Motion Picture Industries, Local 565 of the

IATSE (MPO-TV of California, Inc.), 197 NLRB 1187 (1972), enforced, 447 F.2d 450 (D.C. Cir. 1973), cert. denied, 414 U.S. 1157 (1974), an employer association bargained and had a collective bargaining agreement with the union. The contract gave preference to hiring to individuals listed on an industry roster. Employers who were not members of the association had separate bargaining agreements with the union. These agreements contained the same employment preference provision as the association agreement. The agreements provided that only individuals having work experience with employers who were signatories to one of the aforementioned agreements could be placed on the roster. The Board held that the union had violated Section 8(b)(1)(A) of the Act, stating:

> Respondent's actions penalize employees for having exercised their statutory right to refrain from bargaining collectively, through Respondent in the past, while rewarding those employees who have chosen to work in units represented by Respondent. (footnotes omitted)

Id. at 1188-89. The union attempted to justify the preference provision by contending that all employers, in effect, formed a multi-employer bargaining unit for seniority purposes. The Board rejected this contention, specifically pointing out that non-association members had not authorized the association to bargain for them, but negotiated separately with the union.

The Board further rejected the union's contention that even if a multiemployer bargaining unit did not exist there was still no violation because the seniority provision giving hiring preference was unrelated to union consideration and merely protected the "integrity of the bargaining unit". In this connection, the Board held that the preference provision, even though articulated in terms of "seniority", did not regulate the acquisition of seniority rights after working in a union represented unit but, rather, prevented an applicant from obtaining initial employment unless he had prior employment with a union signatory employer. Under these circumstances, the Board concluded the union was denying employment to individuals based on union

membership considerations. See also Directors Guild of America, Inc. (Association of Motion Picture and Television Producers, Inc.), 198 NLRB 707 (1972), enforced, 494 F.2d 692, 709 (9th Cir. 1974) and Painter's Local Union No. 77 (Colorite, Inc.), 222 NLRB 607 (1976).

In Construction, Building Materials and Miscellaneous Drivers, Local 83, 243 NLRB 328 (1979), a contract provision gave employees a hiring preference based on service with employers who had union contracts. Noting that basing seniority on service with signatory employers is significantly different than basing it on service in the industry (a neutral criterion), the Board found 8(b)(1)(A) and (2) violations, stating:

(T)he contract provisions, on their face, indicate that seniority is based on union considerations. Under these provisions, an employee with greater experience in the industry may lose an opportunity for referral to a lesser experienced employee solely because the lesser experienced employee worked for a signatory employee while the more experienced did not. The provisions, therefore, give rise to the inference that employees are discouraged from exercising their Section 7 right to work with a nonunion employer and are instead encouraged to work only with em-

ployers signatory to agreements with Respondent Unions.

The thread that runs through all the above cited cases is that, notwithstanding actual discrimination, such preferential provisions are inherently discriminatory as they encourage membership.

The provisions in the collective bargaining agreement between the Employer and Respondent are indistinguishable from those of the above cited cases. In this connection, the Agreement itself provides for the displacement of casuals. Thus, Article 4.3-1 provides:

> When a regular employee who is laid off by another Company is hired by Anheuser-Busch, he shall have no seniority rights except

the right to work before casuals at Anheuser-Busch. (emphasis added)

Similarly, Article 4.3-3 provides that "A regular employee, upon loss of employment, shall have the right to replace... (a) casual employee..." (emphasis added). It has been Respondent's consistent position as evidenced by the arbitrations described above, that these provisions be applied pursuant to the agreement. The result of such provisions is that employees of other employers have rights "to work before" and "replace" the Employer's casuals.

Thus, the evidence establishes conclusively that the Employer's casual employees, as a result of the agreement's provisions, Respondents' demands, and the

arbitrations are subject to, and have been, displaced from employment by employees of other Respondent signatory employers. This is unlawful discrimination under the Act because the preference is given to employees of other breweries who have gained longer experience, not in the industry with any employer, but, rather, with a signatory to a contract with Respondent. This gives a preference based on union membership which is unlawful.

Respondent contends that even if a multi-employer bargaining unit does not exist, the contract provisions in issue are not discriminatory because any preference is based upon seniority and not Union membership. In this connection Respondent argues that the casuals and regular em-

ployees of other signatory employers are all members of Respondent and therefore a demand that a regular employee employed by an employer signatory replace a casual employed by the Employer is based upon seniority. However, the same contention was raised by the union in the IATSE case, supra, and rejected by the Board. The basis of that rejection can be illustrated by a hypothetical example applied to the instant case. Assume a situation where an employee with 10 years experience in the brewery industry in the mid-west part of this country and employed by a brewery whose employees are not represented by Respondent, transfers his residence to the Newark, New Jersey area and is hired by the Employer with the expectation that he will

become a regular employee after he works the 225 days casual requirement. Pursuant to the present provisions in issue, such employee could be replaced by a regular employee of a signatory employer with less than 10 years seniority with such signatory employer and in the industry. Such preference clearly tends to encourage membership in Respondent. See Construction, Building Materials and Miscellaneous Drivers, Local 83, supra, which distinguishes between seniority obtained through service with a signatory employer and seniority based upon service in the industry. Where the applicable seniority is based upon service with a signatory employer, as in the instant case, such preference is based upon membership in a union, and violates the Act.

Respondent contends that the contract provisions in issue are not preferential because the Employer is part of a multi-employer bargaining unit. If the Employer were part of a multi-employer bargaining unit it would appear that Respondent's contention would have merit. New York Typographical Union No. 6, supra. This is because the preference would be based upon seniority based upon service in the unit, rather than service with a signatory employer in another unit. However, based upon the facts of this case I conclude that the Employer is not a part of the multi-employer bargaining unit as contended by Respondent.

Participation in multi-employer bargaining is by consent only. As stated by

the Board in Ruan Transport Corp., 234 NLRB 241 (1978):

> The Board has consistently held that 'the essential element warranting the establishment of multi-employer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than by individual action. The correlative standard for excluding an employer from such a unit is evidence of an intent to pursue an individual course of action with respect to labor relations.' As a general rule, the Board has found that an employer does not become a part

> of a multi-employer bargaining group (i.e., it does not intend to be bound by group bargaining) where it merely adopts a collective-bargaining agreement in the negotiation of which it did not actually participate and which it did not authorize another to negotiate on its behalf.

Id. at 242. See also Tampa Bay Area Glazing Contractors Association, Inc., 228 NLRB 360 (1977), wherein the Board held:

> It was well settled that the Board will find a multi-employer unit appropriate only where employers evidence clear intent to particioate in such a bargain-

ing arrangement. (footnotes omitted)

Id. at 361.

In the instant case; Respondent is certified in a bargaining unit limited to the Employer's employees. The Employer withdrew its consent to participate in multi-employer bargaining in 1970 and thereafter its participation in multi-employer bargaining in Newark ceased. Respondent was fully aware of the Employer's withdrawal from the multiemployer bargaining, because it demanded each withdrawal through its participation in the insistence on national bargaining with the Employer in 1970. Since then, the Employer and Respondent have executed separate collective bargaining agreements apolicable only to

the Employer's employees. By 1976 the Employer had withdrawn from Respondent's pension and welfare funds. From this time to the present the onlv common contract provisions between the Employer and other employers with whom Respondent had a contract, were the grievance provisions and seniority provisions. Moreover, since 1977 the Employer had disputed the legality of the seniority provisions as evidenced by the arbitrations described above. Clearly there was no intent bv the Employer to be bound within the meaning of Ruan Transport Corp., supra. What does appear to exist is separate contracts with other breweries (Pabst being the only other brewery at the present time) which have the same grievance and seniority provisions. This is suffi-

cient to establish an intent to be part of a multi-employer unit.

In Gordon Electric Company, 123 NLRB 862 (1959), the Board held that the employer was not a part of a multi-employer unit despite the facts that the Joint Electrical Industry Committee was empowered to consider grievances not resolved by the parties to the contract; preference was given to electrician apprentices previously employed "by employers of a multi-employer unit in Los Angeles county"; the Vacation Plan Committee was composed of three members of the Association and three members of the union, and the "Joint Apprenticeship Committee" consisted of Association members and union representatives. In New York Typographical Union No. 6, supra, the Board

held that independent employers were not part of a multi-employer unit although they agreed to be bound by terms of negotiated contract, contributed funds established by League contract, implemented agreement concerning automated equipment and had equal benefits distributed relating to hiring hall and training and income benefits for displaced employees. See also Ted Hicks and Associates, Inc., 232 NLRB 712 (1977), enf'd, 572 F.2d 1024 (5th Cir. 1978).

Accordingly, I conclude that since 1970 the Employer has made Respondent aware of its intention not to be part of a multi-employer unit and has reinforced this position since 1970 by its withdrawal from the pension and welfare plans and by con-

testing to arbitration, the legality of the seniority provisions. I therefore conclude that since 1970 the Employer has not been part of the multi-employer unit as contended by Respondent.

Respondent contends that the Board should defer to the Rheingold and Pabst arbitrations.

Deferral to an arbitration award is appropriate where (1) the proceedings be fair and regular; (2) that all parties agree to be bound by the award; (3) the decision is not repugnant to the purpose and policy of the Act; and (4) the issue of the involved unfair labor practice issue be presented to and be considered by the arbitrator. Spielberg Manufacturing Co., 112 NLRB 1080, 36 LRRM 1152 (1955); Subur-

ban Motor Freight, Inc., 247 NLRB 146, 103 LRRM 1113 (1980); NLRB v. General Warehouse Corporation, 643 F.2d 965 (C.A. 3, 1981). Applying these standards to the instant case I conclude that the provisions in issue are on their face clearly repugnant to the purpose and policy of the Act. They are as a matter of law unlawful within the meaning of the Act. In this connection, the arbitrator in the Pabst arbitration disavowed deciding the unfair labor practice issue stating: "Any possible violation of the Act, if such were to result, would have to be handled elsewhere to avoid a violation of my authority under the contract."

Upon these circumstances, I conclude deferral would be inappropriate. Olin Corp., 268 NLRB No. 86 (1984); Inland Steel

Co., 263 NLRB 1091 (1982); Port Chester Nursing Home, 269 NLRB No. 24 (1984).

Respondent further contends that the proceeding is barred by Section 10(b). In this regard the Board held in Theatrical Stage Employees, Local 695, 261 NLRB 590, 592 (1982):

> Where a contract with an allegedly illegal clause has been in existence for longer than the 6 month period preceding the filing of a charge, the Board has held that an interpretation or application of the contested contractural provisions by means of an arbitrator's arbitral award is a reaffirmation, renewal or reassertion of the contract and is an

operative event which is susceptible to challenge within six months of its occurrence.

Here, the Pabst arbitration issued within the 10(b) period. Moreover, during this period Respondent representative Jackiewicz demanded that the Employer comply with the award and employ Pabst "regular" employees. Accordingly, I find this contention to be without merit.

CONCLUSIONS OF LAW

1. The Employer is an employer within the meaning of Section 2(2) of the Act and engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By attempting to enforce, through the Pabst arbitration, the seniority provisions contained in its collective bargaining agreement with the Employer, Respondent violated Section 8(b)(1)(A) and (2) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has engaged in the unfair labor practices described above, it will be recommended that it cease and desist therefrom, and to bargain in good faith, upon demand, with the Employer for a new collective bargaining agreement.

Upon the foregoing findings of fact, conclusions of law, and the entire record

in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[4]

The Brewery Workers Joint Local Executive Board, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 153, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and Local 843, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

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4 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Act, the findings, conclusions and recommended Order herein, shall be provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

Helpers of America, herein called Respondent, its officers, agents and representatives shall:

1. Cease and desist from:

(a) Applying, or attempting to force compliance by arbitration or other means, the seniority provisions of its collective bargaining agreement with Anheuser-Busch, Inc., herein called the Employer, in connection with "regular" employees, as defined by the aforementioned collective bargaining agreement, employed by other employers with whom Respondent has a collective bargaining agreement.

(b) In any like or related manner restraining or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at their business offices and all meeting halls copies of the attached notice marked "Appendix".[5] Copies of said notice on forms provided by the Regional Director for Region 22, after being duly signed by authorized representatives, shall be posted immediately upon receipt thereof, and be maintained by them for a period of sixty (60) consecutive days

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5 In the event that this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(b) Mail to the Regional Director for Region 22, the number of copies of said notice requested by said Regional Director for posting by Anheuser-Busch, Inc., said employer being willing, in places where notices to its employees are customarily posted. Copies of said notices, to be furnished by the aforesaid Regional Director after being duly signed by an authorized representative, shall be forthwith returned to said Regional Director.

(c) Notify the Regional Director for Region 22, in writing, within twenty (20) days from the date of this Order, what steps it has taken to comply herewith.

Dated: Washington, D.C. November 20, 1984

Howard Edelman
Administrative
Law Judge

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